RECORD AND BRIEFS

No. 16-980

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,
Petitioner,

—v.—

A. PHILIP RANDOLPH INSTITUTE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ROCK THE VOTE, THE NUNS ON THE BUS OF OHIO, THE TEXAS CIVIL RIGHTS PROJECT, AND THE CENTER FOR MEDIA AND DEMOCRACY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). Moreover, like this case, the *Arizona* case concerned the statutory interpretation of the National Voter Registration Act. The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017); *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009);

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of *amicus* briefs, and these letters are on file with the Clerk.

Shaw v. Reno, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The Lawyers' Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

Founded in 1990, Rock the Vote is a national nonpartisan, nonprofit organization dedicated to building the long-term political strength of young people. From 1991 to 1993, Rock the Vote worked with partners including MTV, Rolling Stone, major musical artists of the era, and elected leaders to support the passage of the National Voter Registration Act of 1993. In 1999, Rock the Vote worked to further increase accessibility of the voter registration process through the creation of an online voter registration tool. Since then, Rock the Vote has continued to advocate for state and federal policies that protect the rights of all eligible voters, while supporting and building innovative technological solutions that make it easier for eligible voters to register and exercise those rights. Rock the Vote has an interest in the instant appeal because it raises important voting rights issues—in particular, issues related to the voting rights of young people and racial and language minorities—that are central to Rock the Vote's mission.

The Nuns on the Bus of Ohio ("NOTB-O") is a gathering of Catholic sisters and their supporters who comprise a subgroup of the national campaign Nuns on the Bus sponsored by NETWORK Lobby for Catholic Social Justice. NOTB-O members have been personally involved in ensuring that all voting in Ohio is fair and open. The members have countered voter discrimination at the local and state level with both on the ground voter registration and

confirmation as well as advocacy. NOTB-O works at the local level to counter systematic voter purging like Ohio's in order to prevent disenfranchising the poor and marginalized.

In its twenty-six year history, the Texas Civil Rights Project ("TCRP") has brought thousands of strategic lawsuits to protect and expand voting rights, challenge the injustices in our broken criminal justice system, and advance racial and economic justice. Today, TCRP's Voting Rights Program represents Texas communities to fight to turn the tide on the state's abysmal voting rights record by removing barriers to voter registration, supporting grassroots voter mobilization efforts, and opposing new attempts to suppress voting. TCRP currently leads a litigation effort to compel Texas to comply with the National Voter Registration Act.

The Center for Media and Democracy is a nonprofit, nonpartisan organization based in Madison, Wisconsin. Founded in 1993, it has focused on investigating and exposing abuses of power that corrupt the proper workings of democratic government. Its particular interest in this case is to bring to light, and end, state voting practices that have the intent or effect of creating discriminatory obstacles to voting.

SUMMARY OF ARGUMENT

Ohio's "Supplemental Process" for removing registrants from its voter rolls, which is triggered by an individual's failure to vote for a mere two years, violates the plain language of the National Voter Registration Act of 1993 (the "NVRA") and runs counter to Congress's intent and purpose in enacting the law. The NVRA reflects Congress's efforts to

expand voter protection beyond the Voting Rights Act of 1965, to *increase* voter participation in the United States, particularly among historically disenfranchised groups,[2] by eliminating administrative barriers to registering and voting. In enacting the NVRA, Congress found that "the right of citizens of the United States to vote is a fundamental right," "it is the duty of the Federal, State, and local governments to promote the exercise of that right," and "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a).

Because the Voting Rights Act did not prevent States from erecting "a complicated maze of local laws and procedures . . . through which eligible citizens had to navigate in order to exercise their right to vote," Congress deemed it necessary "to reduce these obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9, at 3 (1993). Accordingly, Congress's stated purposes in enacting the NVRA were "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," "to make it possible for Federal, State, and local governments to

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[2] President Clinton, upon signing the NVRA into law, remarked: "The victory we celebrate today is but the most recent chapter in the overlapping struggles of our Nation's history to enfranchise women and minorities, the disabled, and the young with the power to affect their own destiny and our common destiny by participating fully in our democracy." Presidential Statement on Signing the National Voter Registration Act of 1993, 29 Weekly Comp. Pres. Doc. 914 (May 20, 1993).

implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office," "to protect the integrity of the electoral process," and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). Congress also emphasized "that once registered, a voter should remain on the list of voters so long as the individual remains eligible to vote in that jurisdiction." H.R. Rep. No. 103-9, at 18. Ohio's Supplemental Process is antithetical to these goals and principles.

The NVRA permits a State to remove individuals from its list of eligible voters only in limited circumstances and requires States to employ reasonable efforts to remove ineligible voters from their registration rolls. *See* 52 U.S.C. § 20507(a)(3)-(4). Although Ohio's Supplemental Process purports to rely on one of these exclusive grounds for voter purging—a registrant's change of address—it does so by selecting for removal voters who simply failed to vote. Congress was keenly aware that the failure to vote is not a reliable indicator whether a registered voter has moved, and for that reason expressly prohibited States from purging voters due to a failure to vote. *Id.* § 20507(b)(2). Congress thus squarely answered the question of whether the method utilized in Ohio's Supplemental Process is a legitimate "reasonable effort" for the maintenance of accurate voter registration rolls: it is not.

Nor can Ohio rely on the amendments to the NVRA that were included in the Help America Vote Act of 2002 ("HAVA") to rescue the Supplemental Process from invalidation. In enacting HAVA, Congress made clear that nothing was meant to undermine the NVRA; rather, Congress sought to clarify that the NVRA's prohibition against purging registered voters

due to their failure to vote does not prevent States from relying on registrants' failure to vote in two *subsequent* Federal elections *once they have been otherwise reasonably identified as potentially having changed residences*. Because the NVRA prohibits the bare use of nonvoting as a means for targeting individuals to be purged from the registration rolls, and because HAVA may not be construed "to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]," 52 U.S.C. § 21145(a)(4), HAVA does not permit Ohio's Supplemental Process.

Finally, census data support the concerns reflected in the legislative history of the NVRA that purging based on nonvoting disproportionately impacts minorities. A smaller percentage of registered minority voters show up at the polls than registered white voters, especially in mid-term elections. Ohio's Supplemental Process thus threatens to impact minorities disproportionately compared to other voters, frustrating a core goal of the NVRA: to increase voter registration, especially among minorities.

The NVRA's clear language and legislative history support the U.S. Court of Appeals for the Sixth Circuit's conclusion that Ohio's Supplemental Process violates the law.

ARGUMENT

I. OHIO'S SUPPLEMENTAL PROCESS FAILS TO MAKE A REASONABLE EFFORT TO TARGET AND REMOVE INELIGIBLE VOTERS

A. The NVRA Requires States to Use Reasonable Efforts to Identify Voters Who Have Moved.

Congress made the following findings when it enacted the NVRA:

> (1) the right of citizens of the United States to vote is a fundamental right;
>
> (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and
>
> (3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

52 U.S.C. § 20501(a). Accordingly, one of Congress's main purposes in enacting the NVRA was to "increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b)(1).[3] Consistent with this objective is

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[3] Petitioner focuses on Congress's stated purposes of "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(3)-(4). But the Supplemental Process does nothing to further these goals, and, in fact, has the

Congress's intent to ensure that eligible voters remain registered. Thus, the NVRA mandates that States may not remove registrants from the voter rolls except in four circumstances: at the registrant's request; upon the registrant's criminal conviction or mental incapacity, both as determined by state law; upon the death of the registrant; and, as relevant here, upon a change in the registrant's residence. 52 U.S.C. § 20507(a)(3), (4). The NVRA proscribes that in no case shall anyone be removed from the list of registered voters "by reason of the person's failure to vote." *Id.* § 20507(b)(2).

With respect to removal due to a change of address, the NVRA instructs that States must conduct a general program that "makes a reasonable effort" to remove ineligible voters from the official lists. *Id.* § 20507(a)(4)(B). It then provides an example of a reliable method to identify individuals whose residences may have changed: utilizing the U.S. Postal Service's national change of address ("NCOA") data. *Id.* § 20507(c)(1)(A). Regardless of the program employed by a State to identify voters who appear to have moved, the NVRA prohibits a State from removing someone from the list of registered voters due to a change in residence unless the registrant confirms his or her change of residence in writing, or fails to do the following after receiving the notice that

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opposite result. As discussed *infra* Part I.B, because the failure to vote is not a reliable means of identifying individuals who may have moved, the Supplemental Process leads to the removal of *eligible* voters from Ohio's registration rolls. The end result is to subvert the integrity of the electoral process, not protect it.

the NVRA mandates[4]: i) return or otherwise respond to the notice card required to be sent; and ii) vote or appear to vote in either of the next two Federal elections (referred to herein as the "Removal Confirmation Process"). *Id.* § 20507(d).

As mentioned above, the NVRA expressly sanctions the use of the U.S. Postal Service's NCOA data to identify registrants who may have moved (the "NCOA Process"). 52 U.S.C. § 20507(c)(1)(A). In fact, Congress implored States to rely on the NCOA Process because it reasonably and indiscriminately identifies potential ineligible voters: "The Committee strongly encourages all States to implement the NCOA program, which is efficient, is cost-effective . . . , and properly implemented, is uniform and objective." S. Rep. No. 103-6, at 19 (1993). Although States are free to devise other methods for identifying voters who have become ineligible due to a change in residence, they do so at their own peril, and Congress was clear that the touchstone for any such State-devised method is reasonableness: "Jurisdictions which choose not to use the NCOA program should implement another *reasonable program* which is designed to meet the requirements of the bill, i.e. that it be uniform, non-discriminatory

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[4] Specifically, the notice required by the NVRA must be a "postage prepaid and pre-addressed return card," on which the registrant can provide his or her current address, and which notifies the registrant, among other things: i) that if he or she does not return the card within the specified time, the registrant may be required to confirm his or her address prior to voting; and ii) if the registrant does not vote in either of the next two Federal elections, his or her registration will be canceled. 52 U.S.C. § 20507(d)(2)(A).

and in conformance with the Voting Rights Act of 1965."[5] S. Rep. No. 103-6, at 19 (emphasis added).

B. Ohio's Supplemental Process Violates the NVRA Because It Is Not Reasonably Tethered to Voter Ineligibility and Results in the Impermissible Removal of Registrants Due to a Failure to Vote.

The list maintenance procedures adopted by Ohio include utilizing the NCOA Process. But Ohio also uses a Supplemental Process pursuant to which it targets for removal from its list of eligible voters individuals who have not engaged in any voter activity for two years, on the ground that a failure to vote indicates that the person may have moved. If an individual is identified under either the NCOA Process or the Supplemental Process as possibly having moved out of the voting jurisdiction, Ohio initiates the Removal Confirmation Process provided for under the NVRA that can lead to registrants' removal from the list of eligible voters. *See id.* § 20507(d)(1)(B), (d)(2); *id.* § 20507(c)(1)(B)(ii) (referring to "the notice procedure described in subsection (d)(2)" as meant "to confirm the change of address").

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[5] The district court below held that the program adopted by a State need not be "reasonable" and that if a program is "otherwise lawful" under the NVRA, the State need not use "reasonable means to purge the voter rolls." *See* 2016 WL 3542450, at *9. This reading of the statute is untenable and irreconcilable with the express statutory requirement that any program must constitute a "reasonable effort" directed at removing registrants who are ineligible to vote due to a change in residence, 52 U.S.C. § 20507(a)(4)(B), and it directly conflicts with the NVRA's legislative history.

Ohio's Supplemental Process does not satisfy the NVRA's requirement that a State make a "reasonable effort to remove the names of ineligible voters" from its voter rolls. *Id.* § 20507(a)(4). Petitioner offers no basis for its assumption that lack of voting activity for two years indicates that electors "likely have moved." *See* Damschroder Decl. ¶ 12, Case No. 16 Civ. 303, ECF No. 38-2 (S.D. Ohio filed May 24, 2016). To the contrary, Congress was mindful when it enacted the NVRA that "people have an equal right not to vote, for whatever reason." S. Rep. No. 103-6, at 17; *see also* Help America Vote Act, H.R. Rep. No. 107-329, at 71 (2001) ("[M]any voters intentionally do not vote in every race."). And yet, Congress admonished:

> [M]any States continue to penalize such non-voters by removing their names from the voter registration rolls merely because they have failed to cast a ballot in a recent election. Such citizens may not have moved or died or committed a felony. Their only "crime" was not to have voted in a recent election. As the Reverend Jesse Jackson stated during the House hearings on voter registration reform in the 101st Congress: "No other rights guaranteed to citizens are bound by the constant exercise of that right. We do not lose our right to free speech because we do not speak out on every issue."...
>
> ....
>
> Such purging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote,

> but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again.

S. Rep. No. 103-6, at 17-18. The flawed assumption in the Supplemental Process that nonvoting correlates to having moved is further belied by Congress's recognition at the time it enacted the NVRA of low voter turnout rates even among eligible citizens. *See* H.R. Rep. No. 103-9, at 3 (noting that there are "many factors involved in the lack of public participation" in Federal elections and that "[e]xpanding the rolls of the eligible citizens who are registered is no guarantee that the total number of voters will increase"); S. Rep. No. 103-6, at 2 (acknowledging that "there are multiple and complex factors that contribute to the decline in voter participation in Federal elections," though "most contributing factors may not be affected by legislation").

At the same time, Congress was intent on doing everything it could "to assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address." S. Rep. No. 103-6, at 2. Accordingly, the NVRA expressly prohibits States from purging individuals from the voter rolls because of their failure to vote. 52 U.S.C. § 20507(b)(2). Yet, by targeting people who have not voted for two years, this is precisely what the Supplemental Process does: there is no dispute that all of the registrants actually removed from the voting rolls through the Supplemental Process are individuals who had not engaged in any voting

activity for two years prior to being identified for potential removal based on that reason alone. Requiring non-voters to take some affirmative step to confirm their continued eligibility to vote is antithetical to Congress's expressed motivations in enacting the NVRA.

Given the utter failure of the State to correlate lack of voting with a likelihood of having moved, Ohio's program cannot be said to satisfy the requirement that it make a reasonable effort to remove only ineligible voters from the rolls. It therefore violates the NVRA, as the court of appeals correctly found. 838 F.3d 699, 710-12.

C. Relying on a Failure to Vote as an Indication that a Voter Has Moved Also Runs Afoul of the NVRA's Requirement that States' Voter List Maintenance Procedures Must Be Uniform, Nondiscriminatory, and in Compliance with the Voting Rights Act.

Petitioner, and some of its *amici*, maintain that employing the Removal Confirmation Process immunizes States from liability regardless of the procedure used to identify registrants who may have moved. *See, e.g.*, Pet'r's Br. 37 ("[T]he Failure-To-Vote Clause does not regulate the classes of registrants to whom States send notices as long as they remove registrants under the Confirmation Procedure."); Br. Amicus Curiae of the United States at 28 ("[N]othing in Section 20507 explicitly requires a State to have 'reliable information' affirmatively

indicating a change in residence before sending a [confirmation] notice . . . .").[6]

But this ignores that the NVRA sets standards for any program developed by a State to monitor its voting rolls for accuracy. All such State programs and activities must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1). "The purpose of this requirement is to prohibit selective or discriminatory purge programs. This requirement may not be avoided by . . . conducting a purge program or activity based on lists provided by other parties where such lists were compiled as the result of a selective, non-uniform, or discriminatory program or activity." H.R. Rep. No. 103-9, at 15. Moreover, Congress intended "to impose the uniform, nondiscriminatory and conforming with the Voting Rights Act standards *on any activity that is used to start, or has the effect of starting, a purge of the voter rolls*, without regard to how it is described or to whether it also may have some other purpose." *Id.* at 31 (emphasis added). There are, therefore, clear limits to a State's discretion in how it designs a program aimed at

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[6] Of course, as its *amicus* brief candidly acknowledges, the United States' current position represents a complete about-face from its prior views, occasioned by the "change in Administrations." U.S. Sup. Ct. Amicus Br. at 14. Just last year, the United States appeared in this case as *amicus curiae* in the Sixth Circuit on behalf of Respondents herein, where it unequivocally maintained that "States cannot use non-voting, without more, as evidence of a change in residence sufficient to trigger the confirmation process." U.S. 6th Cir. Amicus Br. at 10; *see also id.* at 9 ("[I]nitiating the removal process without *some* reliable evidence to suggest that voters have moved cannot qualify as the 'reasonable effort' the statute requires to identify voters who are no longer eligible." (citing 52 U.S.C. § 20507(a)(4))).

maintaining accurate voter registration rolls, and a State may not rely on the NVRA's Removal Confirmation Process to cleanse an otherwise tainted program that improperly targets a select group of voters for removal.

Requiring registrants to perform some affirmative act to remain on the voter rolls, simply because they have not voted, discriminates against individuals who do not vote in a given election, and as discussed *infra* Part III, affects minority voters in particular. The Supplemental Process thus constitutes a "selective" voter purging method prohibited by the NVRA as it is certain to result in the removal from the rolls of numerous individuals who continue to remain eligible to vote.

This discriminatory effect is exacerbated by the normal human response—substantiated by social science—to decline participation in programs where affirmative steps are required. Under the Supplemental Process, infrequent voters who receive a confirmation notice will be removed from the rolls unless they do something to halt the removal process. Even modest administrative requirements have been shown to reduce "take up" or participation rates in a variety of public programs. *Cf.* Frederic Blavin, et al., *Using Behavioral Economics to Inform the Integration of Human Services and Health Programs Under the Affordable Care Act*, at 10 (Urb. Inst. July 2014) ("[W]hen consumers must meet apparently modest procedural requirements, such as checking an opt-in box, *returning a simple form*, or making a telephonic or on-line acknowledgment, they are much less likely to participate in available programs, because of inertia, procrastination, short-term orientation, distraction, confusion, actual underlying preferences, or other factors." (emphasis added));

Donald Moynihan, et al., *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. Pub. Admin. Res. & Theory 43, 46 (Jan. 2015) (positing that behavioral economics explains why burdens "that seem minor and defensible" may "exert dramatic effects when experienced by citizens").

Numerous studies demonstrate the impact of affirmative opt-in requirements on participation rates across a wide range of behaviors, including organ donation, car insurance preferences, and online privacy settings and information sharing. *See* Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1 (2013) (summarizing studies). Similarly here, Congress implicitly recognized that administrative requirements can be a barrier to voter participation when it eliminated reregistration requirements. *See, e.g.*, H.R. Rep. No. 103-9, at 2 (identifying annual reregistration requirements as among the "techniques developed to discourage participation").[7] Given this reality of human behavior, many recipients of a confirmation notice can be expected not to respond. It is therefore vital that the population of voters who receive the confirmation notice be selected based on objective and reliable criteria for believing that they may have moved, not

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[7] It has also been suggested that administrative burdens can serve as a means of "hidden politics" that appear to be "technical fixes without any specific policy intent," but are, in fact, preferences by political actors. Moynihan, *supra*, at 52-53 ("For example, increasing burdens might be justified as a means to prevent fraud, even if their intended instrumental effect is to support other partisan goals (such as reducing the size of the welfare state, or limiting voter turnout in the case of elections).").

because they have failed to vote.[8] Because Ohio's Supplemental Process fails to meet that standard, it violates the NVRA.

II. NOTHING IN HAVA ALTERS THE NVRA'S PROHIBITION AGAINST PURGING VOTERS FROM THE REGISTRATION ROLLS DUE TO A FAILURE TO VOTE

When it enacted HAVA, Congress was clear that nothing in that legislation was meant to undermine the NVRA. HAVA was enacted in response to the 2000 presidential election and the fallout from the litigation that ensued over Florida's recount. *See, e.g.*, H.R. 107-329, at 59 ("The disadvantages of punch card voting systems were highlighted during the recount that took place in Florida following the November 2000 election. Large portions of the American public have lost confidence in them."). Congress incentivized States to modernize their voting systems by offering election funds for States that met certain criteria. HAVA is consistent with the general theme of the Voting Rights Act and the NVRA, namely, to *increase* voter participation. It

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[8] Petitioner also appears to suggest that its Supplemental Process is more lenient than the NVRA's Removal Confirmation Process because the former allows a longer period of time before a registrant is removed from the voting rolls (six years versus four). *See* Pet'r's Br. 26. But that is a red herring. The Removal Confirmation Process is a congressionally sanctioned procedure for removing a registrant from the voting rolls only after a State has reliable information that the individual has moved, and Congress determined that a four-year removal period was appropriate in such circumstances. Ohio cannot cure the impropriety of commencing the removal process based on an individual's failure to vote simply by extending the actual removal period beyond the statutorily-permissible four years.

sought to achieve this by: setting minimum standards for statewide voting registration systems; creating a Federal Election Assistance Commission to assist States in following best practices for administering elections; establishing the Help America Vote Foundation and College Program to encourage increased participation in the electoral process among young voters; encouraging States to allow in-precinct provisional voting; and making it easier for military personnel and citizens living abroad to vote. *See generally* Pub. L. No. 107-252, 116 Stat. 1666 (2002).

The only connection HAVA has to the NVRA's voter purging guidelines is to clarify that a State may rely on the Removal Confirmation Process set forth in the NVRA (i.e., a failure to respond to the required notice coupled with the failure of the individual to vote in two subsequent general elections) *to confirm that a voter has, in fact, changed residences*. Section 903 of HAVA is entitled, "Clarification of Ability of Election Officials to Remove Registrants from Official List of Voters *on Grounds of Change of Residence*." (emphasis added) Prior to HAVA, the NVRA provided, in relevant part:

> Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

42 U.S.C. § 1973gg-6(b)(2) (2000). The purpose of section 903 of HAVA was merely *to clarify* that a State with reason to believe that a voter has changed

residences may rely on the Removal Confirmation Process in the NVRA *to confirm* the voter's change of address:

> Section 8(b)(2) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-6(b)(2)) is amended by striking the period at the end and inserting the following: ", except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual—
>
> > (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
> >
> > (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

Pub. L. No. 107-252, 116 Stat. 1666, 1728.

Because, as reflected in the legislative history of the NVRA, an individual's failure to vote in a single election (such as a mid-term election) is not evidence that the person has changed residences, Section 903 of HAVA likewise does not permit a State to use the failure to vote as a basis to start the purging process. Indeed, the Joint Explanatory Statement of the Committee on Conference for HAVA includes the following warning:

> The minimum standard requires that removal of those deemed ineligible must be done in a manner consistent with the National Voter Registration Act (NVRA).

> The procedures established by NVRA that guard against removal of eligible registrants remain in effect under this Act. Accordingly, [HAVA] leaves NVRA intact, and does not undermine it in any way.

H.R. Rep. No. 107-329, at 66. For avoidance of doubt, HAVA explicitly provides that it may not be construed "to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." 52 U.S.C. § 21145(a)(4). Accordingly, HAVA does not permit Ohio's Supplemental Process.

III. THE SUPPLEMENTAL PROCESS DISPROPORTIONATELY DISENFRANCHISES MINORITIES

The NVRA was enacted in the wake of decades marking a proliferation of state laws and procedures aimed at keeping certain groups of citizens from voting, including immigrants, minorities and the poor. *See* H.R. Rep. No. 103-9, at 2. While great strides have been made to close the gap, the percentage of minorities who register and vote is still less than that for whites. Nationwide census data confirms that turnout differentials persist between whites and non-whites. *See generally* U.S. Census Bureau, Voting and Registration Tables, *available at* https://census.gov/topics/public-sector/voting.html (last visited September 21, 2017). The gap exists during Presidential elections (except for 2012, when voting rates for non-Hispanic blacks exceeded that for non-Hispanic whites for the first time in Presidential

elections since 1980),[9] but it is particularly stark in midterm election years: "Since 1978, voting rates for non-Hispanic blacks and Hispanics have trailed those for non-Hispanic whites in every congressional election . . . ."[10] Thom File, U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-2014*, at 5 (2015), *available at* https://census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf.

Moreover, as particularly relevant here, even when viewed in terms of individuals registered to vote (as opposed to those merely eligible), the turnout rates for minorities still lag behind that of whites. For example, in the most recent midterm election year, 2014, census data reflects that 67% of registered non-Hispanic whites turned out to vote as compared to 63% of registered blacks, 56% of registered Asians and 53% of registered Hispanics. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2014, *available at* https://census.gov/data/tables/time-series/demo/voting-and-registration/p20-577.html (follow links under "Table 2, Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age, for the United States: November 2014")

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[9] *See* Thom File, U.S. Census Bureau, *Voting in America: A Look at the 2016 Presidential Election* (2017), *available at* https://census.gov/newsroom/blogs/random-samplings/2017/05/voting_in_america.html.

[10] As used in this context by the U.S. Census Bureau, "voting rates are calculated by dividing the total number of reported voters by the total number of eligible voters (i.e., citizens who are at least 18 years old)." *Id.* at 2.

(last visited September 21, 2017).[11] Given the racial gap in voter turnout rates, Congress's efforts to protect from improper removal individuals who vote only sporadically are particularly important for voters of color. Yet, because the Supplemental Process targets individuals for removal based on their failure to vote in even one election, it has a disproportionate impact on minorities, particularly following midterm election years.

Even if response rates to the confirmation notice or subsequent voting activities are substantially comparable across races, minorities are likely to be removed from the voter rolls at a greater rate than whites based on the initial trigger. This disparity was noted prior to passage of the NVRA. *See* S. Rep. No. 103-6, at 17-18 (noting that, by relying on non-voting as a trigger for removal, "many persons may be removed from the election rolls merely for exercising their right not to vote, a practice which some believe tends to disproportionately affect persons of low incomes, and blacks and other minorities"); *id.* at 18 ("[Purging] processes . . . must be scrutinized to prevent poor and illiterate voters from being caught in a purge system which will require them to needlessly re-register. Such processes must be structured to prevent abuse which has a disparate impact on minority communities. Unfortunately, there is a long history of such list cleaning mechanisms which have been used to violate the basic rights of citizens.").

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[11] To calculate the turnout rates among registered voters, divide (i) the value reflected in the "US Citizen" column showing the "Number" of "Both sexes," "Total 18 years and over," who "Reported voted," by (ii) the value reflected in the "US Citizen" column showing the "Number" of "Both sexes," "Total 18 years and over," who "Reported registered."

The discriminatory impact of this procedure was Congress's precise concern when it passed the NVRA. *See id.* at 3 ("[T]he Committee has been concerned with the impact of a regulation or practice on the exercise of the right to vote and not with the question of whether its impact was intentional or inadvertent."). As a result of the Supplemental Process, a greater percentage of voters of color who remain eligible are likely to be removed from the voter rolls in Ohio and will be required to reregister in order to regain their constitutional right to vote. Thus, using the failure to vote as a trigger for removal continues the very "discriminatory nature of periodic voter purges" that the NVRA sought to redress. *Id.* at 20.

Contrary to the language and intent of the NVRA, the Supplemental Process is likely to *decrease* registration and turnout rates among eligible citizens of color, because it is based on a standard that has a disproportionate impact on minorities. This is the opposite of what Congress intended in enacting the NVRA.

CONCLUSION

For the foregoing reasons, as well as those in Respondents' Brief, the judgment of the U.S. Court of Appeals for the Sixth Circuit should be *affirmed*.

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Respectfully submitted,

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